IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 6 OF 2002

Augustine Decker,
presently undergoing
sentence at Central
Jail, Aguada, Bardez,
Goa. ... Appellant.

versus

S T A T E ... Respondent.

Mr. Arun Bras De Sa, Advocate for the Appellant.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM: P. V. HARDAS, J.

DATED: 21ST AUGUST, 2003.

ORAL JUDGMENT

The Appellant/Accused who is convicted for an offence punishable under Sections 20(b)(ii)(A) and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to undergo Rigorous Imprisonment for 5 years and to pay a fine of Rs.50,000/- in default Simple Imprisonment for 6 months, Rigorous Imprisonment for 6 months, the two substantive sentences being concurrent, by the Special

Judge, Narcotic Drugs and Psychotropic Substances Court, Mapusa, by Judgment dated 21st December, 2001, in Special Case No.22/2000, has filed the present Appeal challenging the aforesaid conviction and sentence.

2. The facts as are necessary for the decision of this Appeal are set out hereunder:-

P.W.4, P.S.I. Shaikh Salim, was attached to the Anti Narcotic Cell Police Station at Panaji. On 25th January, 2000, at about 6 p.m., he received a specific and reliable information, through his sources that one Nigerian National, aged about 45 years, dark complexion and strong built would be coming to deliver a consignment of drugs at about 9 p.m. at Bela Vista Restaurant at Sangolda village. P.W.4, P.S.I. Shaikh Salim, reduced the said information into writing and sent a copy thereof to P.W.6, Dy.S.P. Shirish Thorat. The copy of the said information is at Exh.PW4/D. The letter addressed to P.W.6, Dy.S.P. Shirish Thorat, containing the information is at Exh.PW4/E.

3. P.W.4 , P.S.I. Shaikh Salim, thereafter secured the presence of two panchas namely P.W.3, Mandar Sardessai and one Pundalik Gawade and informed them about the information which he had received and

requested them to act as panchas. Since both the persons agreed to act as panchas, P.W.4, P.S.I. Shaikh Salim and the Members of the raiding party proceeded to Sangolda in two private vehicles. P.W.4, P.S.I. Shaikh Salim, carried the seal of Anti Narcotic Cell 3 with Ashoka Emblem whereas P.W.7, Devidas Gawas, carried a kit box containing weighing, packing and other material. The raiding party arrived near the hotel at about 8.30 p.m. and concealed themselves near the said restaurant. At about 9.05 p.m., one person of dark complexion came on foot from the Calangute side and stood near the restaurant. Since his description matched with the description of the person through the information earlier received by P.W.4, P.S.I. Shaikh Salim, the said person was surrounded by the Members of the raiding party including the panchas. P.W.4, P.S.I. Shaikh Salim, informed the said person, who was identified as the Accused in the trial, that he had received specific and reliable information that the Accused had come to deliver a consignment of drugs and accordingly told the Accused that he wanted to take his search for drugs. An option was given to the Accused to be searched, either before a Magistrate or a Gazetted Officer which the Accused declined. The Accused was also informed that he had a right to search the Members of the raiding party including the panchas

which also the Accused declined and agreed to be searched by P.W.4, P.S.I. Shaikh Salim.

4. On the personal search of the Accused, in the right side pant pocket, one transparent polythene bag tied with a rubber band was found. The said polythene bag contained brownish colour powder and the same was suspected to be brown sugar. The said polythene bag was weighed and it was found to weigh 100 gms. The polythene bag was then sealed and the envelope was signed by two panchas, the Accused and P.W.4, P.S.I. Shaikh Salim. In the further search, in the left hand side pant pocket, a polythene bag tied with rubber band containing blackish colour substance in different sizes and shapes, numbering 14 was found. The said substance was suspected to be charas and on weighing it was found to weigh 63 gms. The said substance was also packed and sealed in the similar manner as above. Cash of Rs.1100/- was also found which was packed and sealed. The Accused was asked if he had documents in his possession in respect of the drugs and on his answering in the negative, he was taken into custody after explaining the grounds of arrest. A panchanama of the entire sequence of events was drawn and the same is at Exh.PW3/A. The Seizure Report evidencing the seizure of drugs is at Exh.PW3/B.

5. P.W.4, P.S.I. Shaikh Salim, on his return to the Police Station, filed his complaint which is at Exh.PW4/A. Vide Exh.PW4/B, the seized property was handed over to the Police Inspector of the Anti Narcotic Cell Police Station for safe custody. By the said letter the seal of the Police Station was also delivered to the Police Inspector. Intimation under Section 57 of the Narcotic Drugs and Psychotropic Substances Act, 1985 was given vide Exh.PW4/C. A specimen seal letter at Exh.PW1/A was also given.

6. Through Constable Buckle No.1537, the muddemal property was sent to the C.I.D. Crime Branch and the same was received by P.W.2, Manohar Joshi, along with the covering letter at Exh.PW2/A. P.W.2, Manohar Joshi, has acknowledged the receipt of the muddemal property by his endorsement dated 26th January, 2000. He had kept the muddemal property in a steel cupboard under lock and key and had forwarded the same to the Director of Food and Drugs Administration, Panaji by a covering letter at Exh.PW1/B. The muddemal property was analysed by P.W.1, Mahesh Kaissare on 1st March, 2000 and by his report at Exh.PW1/C he opined that the property analysed by him tested positive for heroin and charas respectively.

7. On completion of the investigation, a charge-sheet against the present Appellant/Accused came to be filed. The learned Special Judge, Narcotic Drugs and Psychotropic Substances Court, Mapusa, vide Exh.4 framed a charge against the Appellant/Accused. The Accused pleaded not guilty and claimed to be tried. The prosecution in support of its case examined 7 witnesses while the Accused examined himself as D.W.1 and examined one Manuel Travasso as D.W.2. The defence of the Accused appears to be of denial. The learned Trial Court on consideration of the evidence came to the conclusion that since no previous convictions against the Accused were proved and also as the Accused was aged about 60 years with a history of Ischemic heart disease, the learned Trial Court convicted and sentenced the Accused as aforestated.

8. In the cross-examination, P.W.4, P.S.I. Shaikh Salim, has admitted that he was not knowing to whom the Appellant/Accused was to deliver the consignment of drugs. He has pleaded ignorance to the suggestion that the consignment was to be delivered to one Vijay. He has also denied the suggestion that he did not meet the Accused but had met one Vijay and the said Vijay had handed over 100 gms. of brown sugar and 63 gms. of charas. He also denied the suggestion

that from the place where they had concealed themselves, the road was not visible. He has admitted in the cross-examination that in response to the appraisal of the right to the Accused, the Accused had replied "that he did not like to be searched before a Gazetted Officer or a Magistrate". He denied the suggestion that he had not given any offer to the Accused towards the compliance of Section 50. He has admitted that the Accused was admitted in the Goa Medical College on 26th January, 2000, after he was arrested as the Accused had complained of chest pain at 9.20 p.m. He denied the suggestion that the signature of the Accused was obtained in the Goa Medical College.

9. P.W.3, Mandar Sardessai, who is a panch witness, has deposed about the seizure of 100 gms. of brown sugar and 63 gms. of charas from the pant pocket of the Accused. He has also deposed about the offer of search which was made to the Accused. In the cross-examination, he has admitted that neither P.W.4, P.S.I. Shaikh Salim nor one havaldar by name Deu are his friends. He has reiterated that the panchanama was drawn in his presence. Some omissions were brought out from the panchanama in respect of the name of the havaldar who had called him. He has admitted that they had concealed themselves in the compound of

a house which was across the road. He has denied that the gate of the compound had a lock. He has admitted that P.W.4, P.S.I. Shaikh Salim was talking to the Accused in English. He denied the suggestion that the Accused does not know English. Similarly, he has denied the suggestion that the Accused was arrested from his house at Saligao. He has also denied the suggestion that the signature of the Accused was obtained while the Accused was in hospital. He has also denied the suggestion that the brown sugar and charas was given by one Vijay to P.W.4, P.S.I. Shaikh Salim.

10. A perusal of the evidence of P.W.4, P.S.I. Shaikh Salim and P.W.3, Mandar Sardessai, reveals that despite searching and lengthy cross-examination, nothing has been elicited in their cross-examination to discredit their version in the examination-in-chief.

11. The prosecution has examined P.W.5, Lavu Mamledar, who at the relevant time, was an Officer-in-charge of the Anti Narcotic Cell Police Station. He has admitted to have received the property with a covering letter Exh.PW4/B. On receipt of the muddemal property, an entry in the muddemal register vide entry No.8/2000 was also made. He was

also a Member of the raiding party and has deposed about the seizure of the drugs from the possession of the Accused. In the cross-examination, he has denied the suggestion that the documents were prepared in the Police Station. Nothing has been brought out by the defence to discredit the version of this witness.

12. The prosecution also examined P.W.6, Dy.S.P. Shirish Thorat, who has deposed about the receipt of the letter containing the information received by P.W.4, P.S.I. Shaikh Salim. The prosecution has also examined P.W.7, Devidas Gawas, who was also a Member of the raiding party in whose presence, the drugs were seized.

13. The Accused examined himself as D.W.1 and has stated that he had come to Goa as a tourist in December, 1999. One Vijay, with whom he was acquainted had invited him to his house. He had loaned Rs.15,000/- to said Vijay to enable him to start a restaurant at Anjuna. He further states that he was called by said Vijay on 25th January, 2000, for return of the said amount advanced to him. He has further deposed that he had parked his Kinetic Honda scooter and had met the said Vijay infront of Bela Vista Hotel. The said Vijay had asked him to wait in the restaurant, so he had gone in the restaurant to

have a cup of tea. Suddenly people in civil dress came and surrounded him and he was asked to stand up and was searched. According to the Accused, nothing was found on his person except cash of Rs.400/-. He was made to take the Police to his residence and at his residence, a bag containing Rs.20,000/- and a 50$ note was found. Next morning, he was taken to the Goa Medical College as he was indisposed and was kept in the Intensive Care Unit for 11 days. He has stated that his signature was obtained on some paper in the Goa Medical College. He has denied that any drugs or an amount of Rs.1100/- was found on his person. In the cross-examination, he has admitted that he was arrested near Bela Vista Hotel, Calangute. The documents which are produced by him and marked as Exh.19 disclose that he was advised Coronary Angiography and further Cardiac intervention, if required. He had history of chest pain on left side for the last 10 years.

14. D.W.2, Manuel Travasso, who is the Assistant Jailor attached to Judicial Lock-up states that when the Accused was brought to judicial custody on 8th February, 2000, was found to possess cash of Rs.400/-. He had also a bag in his possession. He has produced the extract of the undertrial register which shows the amount received by the Accused from time to time. The

learned Trial Judge while appreciating the evidence of the witnesses examined on behalf of the defence has found that there was no material that an amount of Rs.20,000/- was available with the Accused and that he had given a hand loan to one Vijay. The learned Trial Court also found that the defence of the Accused was an afterthought. The learned Trial Court, therefore, found that the prosecution had proved the case of the Accused beyond reasonable doubt.

15. Mr. Arun Bras De Sa. learned Counsel appearing on behalf of the Appellant/Accused has urged before me that according to P.W.4, P.S.I. Shaikh Salim, he had seized 100 gms. of brown sugar and 63 gms. of charas. When the said sample was weighed by P.W.1, Mahesh Kaissare, he had found 100.48 gms. of brown sugar and 61 gms. of charas. In view of the discrepancy in the weight, it was tried to be urged by the learned Counsel appearing on behalf of the Appellant that the sample which was analysed by P.W.1, Mahesh Kaissare, was not the same sample of drugs which was seized from the possession of the Accused. It is true that there is some discrepancy in the weight. The reason for the discrepancy in the weight is not far to seek. The cross-examination of P.W.1, Mahesh Kaissare reveals that while weighing charas he did not weigh the outer packing and, therefore, the

sample of charas which was stated to weigh 63 gms, weighed only 61 gms. In respect of the discrepancy of .48 gms. in respect of brown sugar, P.W.1, Mahesh Kaissare, has volunteered that the balance used by him was an electronic sensitive balance. The balance which was used by the Police Officers was an ordinary balance. Be that as it may, the discrepancy is extremely minor and on the basis of the discrepancy an inference cannot be drawn that the sample which was analysed by P.W.1, Mahesh Kaissare was not the same sample which was seized from the possession of the Accused.

16. With the assistence of the learned Counsel for the parties, I have perused the evidence and the documents. The reasoning of the learned Trial Judge is based on the evidence on record and requires no interference in this Appeal.

17. Mr. Arun Bras De Sa, learned Counsel appearing on behalf of the Appellant has further urged before me that admittedly, the Appellant/Accused is a heart patient. The learned Trial Court has also while sentencing the Accused taken into consideration the fact that the Accused is suffering from Ischemic heart disease. The Accused after his arrest has been advised Coronary Angiography. The Accused has been in

custody since the date of his arrest i.e. from 26th January, 2000 and has now virtually undergone 3 1/2 years of the term of imprisonment of 5 years passed against him. In such circumstances, it is pleaded that the Accused be released on the period of imprisonment already undergone.

18. The Accused was admitted in the Goa Medical College on 26th January, 2000, and was discharged on 5th February, 2000. He was diagnosed as suffering from Ischemic heart disease. Certain medicines had been prescribed and he had been advised certain follow-up treatment which included Coronary Angiography and further Cardiac intervention, if required. The Accused had been suffering from heart disease for the last 10 years as is evident from the medical history in Exh. 19. In view of the serious heart ailment with which the Accused is suffering and also in view of the fact that he has been advised Coronary Angiography, according to me, the period of 3 1/2 years of imprisonment which the Accused has undergone would meet the ends of justice. The sentence passed by the learned Trial Court of Rigorous Imprisonment for 5 years for an offence punishable under Section 21 and Rigorous Imprisonment for 6 months for an offence punishable under Section 20(b)(ii)(A) of the Narcotic Drugs and Psychotropic

Substances Act, 1985, therefore, is modified. The Accused is accordingly sentenced to undergo Rigorous Imprisonment for the period of imprisonment already undergone.

19. The Appeal is accordingly partly allowed. The conviction of the Appellant for an offence punishable under Sections 20(b)(ii) and 21 of the Anti Narcotic and Psychotropic Substances Act, 1985 is maintained. However, the sentence is altered to the period already undergone. The Appellant/Accused shall be released forthwith, if not wanted in any other case.

P. V. HARDAS, J.

RD.